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Supreme Court of the United States

OCTOBER TERM, 1995

COLUMBIA CONVALESCENT CENTER, INC., COMER HEALTH CARE, INC., SAVANNAH HEALTH CARE, INC., BON AIR LIFE CARE, INC., BROWNWOOD NURSING HOME, INC., LAFAYETTE HEALTH CARE, INC., BAINBRIDGE HEALTH CARE, INC.,

Petitioners,

vs.

GEORGIA DEPARTMENT OF MEDICAL ASSISTANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether a unique Georgia statute, OCGA §9-2-60, which authorizes automatic dismissal of a civil action for failure of prosecution, without notice and hearing, if certain orders were not entered in the case for a five year period, even if the case was not dormant but was being vigorously pursued, denied Petitioners due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, particularly since Petitioners did indeed obtain a order of continuance from a trial judge, which order was later held not to comply with the requirements of the law?

2. Whether a unique Georgia statute, OCGA §9-2-60, which authorizes automatic dismissal of a civil action without notice and hearing based on a presumption of lack of prosecution arising from the failure of a court to enter certain undefined "orders" in the case during a five-year period, deprives a party of substantive due process in presuming lack of prosecution from the lack of such orders being entered within the five-year period, particularly where the orders which will preclude dismissal are not only so ill-defined under court decisions as to render it difficult to ascertain which ones suffice, but also where the lack of entry of such orders manifestly lacks any rational relationship to whether there has been a lack of prosecution or not, resulting in many cases being dismissed, which were in fact being vigorously prosecuted and which ultimately lead to a court ruling in the party's favor, such as this case?

3. Whether a unique Georgia statute, OCGA §9-2-60, which authorizes automatic dismissal of an action for failure to prosecute because certain orders were not entered in the matter within a five year period can be applied to federal claims brought in state court.

4. Whether a unique statute of the State of Georgia, OCGA §59-10-2, which declares that any order

or other judicial action in which the state or any state official is a party is void unless the Attorney General of Georgia was given at least five (5) days' notice prior to the hearing at which the order was entered, is unconstitutional as denying equal protection of the law where, in addition to lacking any rational basis for such discrimination in favor of the Attorney General, it is also seen that the statute is interpreted in such manner as (1) To apply to orders that do not impinge upon any substantial rights, and (2) To be not subject to waiver by conduct, thereby conferring greater rights upon the Attorney General of Georgia than upon any other litigant, with respect to rights which by their very nature are equally valuable to all litigants?

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The parties are those set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner Columbia Convalescent Center, Inc., Comer Health Care, Inc., Savannah Health Care, Inc., Bon Air Life Care, Inc., Brownwood Nursing Home, Inc., Lafayette Health Care, Inc., and Bainbridge Health Care, Inc. pray that a writ of certiorari issue to review the judgment and order of the Supreme Court of Georgia.

OPINIONS BELOW

The decision of the Supreme Court of Georgia, rejecting Petitioners' constitutional claims, is reported as *Georgia Department of Medical Assistance v. Columbia Convalescent Center, Inc.* et al, 265 Ga. 638, 458 S.E.2d 635 (decided June 30, 1995, reh. den. July 28, 1995)(Appendix B at 2a-7a and Appendix A at 1a). The decision of the Court of Appeals of Georgia holding that Petitioners' case should be dismissed for lack of prosecution, but remanding the case for consideration of the constitutional questions urged here, is reported as *Department of Medical Assistance v. Columbia Convalescent Center, Inc.*, 203 Ga. App. 535, 417 S.E.2d 195 (1992)(See Appendix D at 13a-16a). The opinion of the trial court upholding Petitioners claims on the merits is unreported but is found in Appendix E, 17a-26a.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Georgia, upholding the constitutionality of the two Georgia statutes drawn in question here under the Constitution of the United States and finally dismissing Petitioners' claims, was rendered on June 30, 1995. (Appendix B at 2a-7a). A motion for reconsideration was timely filed by Petitioners and the motion for rehearing was denied on July 28, 1995. (Appendix A at 1a). The order of the Superior Court of Columbia County, Georgia, the trial court, holding OCGA §9-2-60, the failure-to-prosecute

statute, to be unconstitutional, but upholding the constitutionality of the Attorney General's 5-day notice statute, OCGA §9-10-2, was entered September 8, 1994. (Appendix C at 8a-12a).

This Court's jurisdiction to review this case upon certiorari is conferred by 28 U.S.C. § 1257, the Supreme Court of Georgia, the highest court of the State, having upheld, in a final judgment, two statutes of the State of Georgia against challenges under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Georgia Failure To Prosecute Statute, OCGA §9-2-60:

"(a) For the purposes of this Code section, an order of continuance will be deemed an order and the word "proceedings" shall be held to include, but shall not be limited to, an appeal from an award of assessors or a special master in a condemnation proceeding.

(b) Any action or other proceeding filed in any of the courts of this state in which no written order is taken for a period of five years shall automatically stand dismissed with costs to be taxed against the party plaintiff."

The Attorney General's Five Day Notice Statute, OCGA § 9-10-2:

"Any verdict, decision, judgment, decree, order, ruling, or other judicial action by any court in this state in any matter in which this state or an officer of this state in his official capacity is a party defendant, intervenor, respondent, appellee, or plaintiff in fi.fa. shall be void unless it affirmatively appears as a matter of record either --

(1) That the Attorney General was given five days' advance written notice by the adverse party or his attorney of the time set for the particular trial, hearing or other proceeding as a result of which the verdict, decision, judgment, decree, order, ruling, or other judicial action was entered; or

(2) That the Attorney General or an assistant attorney general was present in person at the trial hearing, or other proceeding; or

(3) That the Attorney General or an assistant attorney general has, in writing, waived the notice."

Fourteenth Amendment To The Constitution Of The United States:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Preliminary Statement

Applying the State's unique failure-to-prosecute law which has no analog under the laws of any other jurisdiction, the Supreme Court of Georgia upheld dismissal, for failure to prosecute, of a civil action seeking vindication of rights under federal law, namely the Boren Amendment, 42 U.S.C. §1396a(a)(13)(A). The case was dismissed despite the fact that the Petitioners had not failed to prosecute the instant case, and it was, in fact, being vigorously pursued. Indeed Petitioners were successful in the action, with the trial court holding that the Respondent had acted arbitrarily and capriciously in applying an improper reimbursement formula in violation of the Boren Amendment.

The unique Georgia law raises a conclusive, irrebutable presumption that a party who has not

secured a written order from a court for five years in a given case is presumed to have failed to prosecute that case, even if the parties were in fact actively litigating the matter during that period. To make matters worse, the unique law is not applied evenhandledly, since some orders may qualify to toll the application of the five year period, while other orders (such as an order of continuance entered in this case) may not so qualify, thereby depriving litigants of any guidance about when the law applies and when it does not.

The state courts upheld the dismissal of this action despite the fact that Petitioners had secured a continuance order (otherwise sufficient to bar dismissal under the statute). But that order was considered invalid because the record failed affirmatively to show that the Attorney General of the State received five days' prior notice of the continuance order, a requirement under another section of Georgia law that does not apply to any other litigant. The record shows, however, that the Attorney General failed to object to the order, and in fact he later agreed to another order continuing the case because the State itself was still preparing for the hearing. In so holding, the Georgia Courts rejected a claim that the statute had been waived by conduct, indicating that waiver could occur only by an express written document, thereby placing the rights of the Attorney General of Georgia on a higher scale of protection that life and liberty of a citizen in any civil or criminal proceeding.

How The Case Arose

On May 7, 1981, at a time when interest rates and construction costs had risen to an all-time high (R. 182-3, 144, 334, 1158), the Department of Medical Assistance of Georgia (DMA) adopted a drastic reduction in the "property and related" component [1] of federal Medicaid

1 Regulations of DMA divide the medical reimbursement formula into five groups of expenses, one of which is "Property and Related" which covers

reimbursement for nursing homes in Georgia under the Boren Amendment, 42 U.S.C. §1396a(a)(13)(A), which requires rates "which the state finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate . . . " This action was taken contrary to Georgia law which required prior notice and opportunity for hearing by providers, OCGA §49-4-142(a), and was based solely upon a shortage of funds, which all the cases considering the question had held was not a legitimate basis for reduction of reimbursement under the federal statute. *Illinois Hospital Association v. Illinois Department of Public Aid*, 576 F. Supp. 360, 371 (D.C. Ill. 1983); *Harris v. McRae*, 448 U.S. 297, 301 (1980); *Alexander v. Choate*, 469 U.S. 287, 289, n. 1 (1985); *Colorado Health Care Assn. v. Colorado Department of Social Services*, 598 F. Supp. 1400, 1407 (D.C. Colo. 1984), aff'd. 742 F2d 1158 (lst Cir. 1988); *Alabama Nursing Home Assn. v. Harris*, 617 F.2d 388 (5th Cir. 1980).

Petitioners filed complaint in the United States District Court for the Northern District of Georgia under 42 U.S.C. § 1983 to overturn the reduction. When DMA insisted that administrative proceedings before DMA first must be exhausted (R. 49), administrative proceedings were initiated before DMA. In its opening statement at the administrative hearing (R. 44-5, 48-49); during the hearing (R. 44-48); and in its Brief (R. 927 et seq.), DMA contended that the hearing officer was powerless to overrule DMA (R. 927); that the approval by the Federal Health and Human Services Department (HHS) was conclusive on the hearing officer and the courts (Id.); that the Medicaid statute created no enforceable rights (R. 930); and that DMA's new rule was not really a "rule", subject to the prior notice and hearing requirements of OCGA §49-4-142(a). (R. 931). The hearing officer adopted the reasoning of DMA in his decision (R. 489-503; 706-720) and the

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capital costs of building and fixtures, rental payments, etc.

Commissioner of DMA approved on September 13, 1984 (R. 19).

Petitioners then filed a petition for judicial review in Columbia Superior Court as permitted by the Georgia Administrative Procedure Act, OCGA § 50-13-19, on October 12, 1984 (R. 17). The case remained pending there, with one entry of one order involving withdrawal of one of petitioners' counsel on June 17, 1988 (R. 1837, 1476), until September 1, 1989. On that date, an order of continuance was signed and entered by the Court which also set a hearing on the merits. A motion to open the record to present additional evidence was also filed. (R. 1459). The State filed a response on the merits on October 2, 1989 but never objected to the continuance (R. 1462). On September 28, 1989, prior to the 5-year anniversary of the filing of the petition for review, counsel for petitioners and the Assistant Attorney General agreed upon another continuance which was approved by the Court via telephone (R. 1841) and confirmed in writing (R. 1877), but not then reduced to a written order of court (R. 1820-21, 1852).

The case was heard on the merits on December 11, 1989 (R. 1821). Thereafter, the parties exchanged briefs several times (R. 1480, 1548, 1623, 1707, 1711, 1718, 1749, 1756), but on no occasion did DMA object to the continuance order of September 1, 1989.

In the meantime, this Court rejected substantially every contention upon the merits that DMA had relied upon, in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990). DMA then switched its position and urged that the Hearing Officer's decision was supported by evidence (R. 1676, 1749). The trial court rendered decision for petitioners on the merits on December 26, 1990 (R. 1761). DMA then filed a motion to set aside under OCGA § 9-11-60, claiming for the first time that the case stood automatically dismissed under OCGA § 9-2-60, because over five years had elapsed since the petition for judicial review had been filed, and the only two orders entered during that time were void for failure

of the Attorney General to have been given five days' notice under the Attorney General's special notice statute, OCGA §9-10-2 (R. 1778).

Petitioners filed a response, opposing the motion on non-constitutional grounds, and challenging the constitutionality of the two statutes under federal and state due process and equal protection grounds, respectively, and praying for a *nunc pro tunc* order memorializing the continuance that had been granted by the Court in September, 1989, agreed upon between counsel, and confirmed in writing by letter prior to expiration of the 5-year period (R. 1785-1789). The trial court denied DMA's motion and granted the order of continuance *nunc pro tunc* to September 1, 1989 (Appendix F and G, 28a and 30a)(R. 1843, 1844-46). The trial court also had before it undisputed record evidence that the order of June 17, 1988, permitting withdrawal of counsel, had been served on counsel for DMA more than five days prior to entry (R. 1443-46; 1831; 1852; 1881).

On the merits of the action, the trial court found in Petitioners' favor and by order entered on December 26, 1990 held that the DMA had acted arbitrarily and capriciousy in determining the "property and related" cost component in the reimbursement rates. (Appendix E, 17a *et seq.*)

The Court of Appeals of Georgia granted discretionary review, pursuant to OCGA § 5-6-35(a)(8). On March 11, 1992, it reversed the trial court, holding that the case had become dormant on October 12, 1989, the fifth anniversary of the original filing; that the order permitting withdrawal of counsel, entered June 17, 1988, and the order of continuance of September 1, 1989 were void under the Attorney General's 5-day notice statute, OCGA §9-10-2; that the order of continuance *nunc pro tunc* was void as being unauthorized by law; but that the case should be remanded back for the trial court to consider the constitutional challenge to the two statutes. *Georgia Department of Medical Assistance v. Columbia*

Convalescent Center. Inc., et al., 203 Ga. App. 535, 417 S.E. 2d 195 (1992)(Appendix D at 13a-16a).

In reversing the judgment of the trial court, the Court of Appeals stated that DMA's counsel did not have the requisite notice of the order permitting counsel to withdraw, 203 Ga. App. at 536, despite the fact that the record showed otherwise. (*Id.*; 15a). Secondly, the Court of Appeals held that the *nunc pro tunc* order of continuance of September 1, 1989, was not permissible in a case involving the failure-to-prosecute statute, contrary to the Georgia Supreme Court's decision in *Jefferson v. Ross*, 250 Ga. 817, 301 S.E. 2d 268 (1983). Notwithstanding, the Supreme Court of Georgia denied certiorari on July 16, 1992. See 203 Ga. App. 905.

On remand, the Superior Court of Columbia County, Georgia held OCGA § 9-2-60 to be unconstitutional but upheld the Attorney General's 5-day statute by order entered September 8, 1994 (Appendix C at 8a-12a).

The Superior Court held that a party's cause of action was a property interest that could not be denied without due process. The Court noted that the dormancy statute did not provide for notice or hearing before an order of dismissal was issued. It noted:

> The statute results in the automatic dismissal of cases in which no written order has been taken in five years but which might otherwise remain active. At the same time, it allows a truly dormant case to be refiled. It is this reality that caused the Court of Appeals to declare "fairly ludicrous" the idea that the dormancy statute achieves the objective of resolving inactive litigation. *Republic Claims v. Hoyal*, 210 Ga. App. at 91. (11a).

The Court also noted that the State's interest in clearing the dockets of truly inactive cases was not well served by the law.

> It is true that the state has an interest in fiscal and administrative efficiency which would be aided by the dismissal of inactive litigation. The individual's interest in his or her cause of action is important, however, and, since some active cases would be dismissed under the statute, the probable value of additional or substitute procedural safeguards is high. (11a)

It also noted the uniqueness of the Georgia law.

> It is noteworthy that, of the thirty-seven states with automatic dismissal laws, Georgia alone denies notice, opportunity for a hearing or opportunity for reinstatement. Louisiana's automatic dismissal statute most closely resembles Georgia's in that it, like Georgia's alone, does not provide notice. La. Code of Civil Procedure Annotated, Art. 561 (West Supp.) However, unlike the statute here in question, application of the Louisiana statute can be waived by the conduct of the parties, *State v. United Dredging Co.*, 218 La. 744, 50 So.2d 826 (1951). The Louisiana statute also allows the plaintiff to move for an order to show cause providing post-dismissal review, a right not accorded by our statute. Thus of the fifty states, Georgia alone has a dormancy statute which in all cases denies notice or opportunity for a hearing; a further indication that the value of such procedural safeguards outweighs the state's interest in tho efficient disposal of dormant cases. (11a)

The Court concluded:

> The individual's interest in the preservation of his or her active cause of action, coupled with the probable value of such additional procedural safeguards as notice or opportunity for hearing, combine to outweigh the

> state's interest in any fiscal or administrative efficiency which might be furthered by application of the statute. *Mathews v. Eldridge*, 424 U.S. at 335. (11a)

The Supreme Court of Georgia granted review and on June 30, 1995, reversed the order declaring OCGA § 9-2-60 to be unconstitutional. It held:

> We conclude that the automatic dismissal statute is a reasonable procedural rule. It is reasonable, in part, because it "furthers the dual purpose of ... prevent[ing] 'court records from becoming cluttered by unresolved and inactive litigation and [of] protect[ing] litigants from dilatory counsel.'" The statute also affords litigants, who have constructive knowledge of its provisions, "'an opportunity ... at a meaningful time and in a meaningful manner'" to litigate their claims. To this end the statute grants a litigant five years to produce only the most minimal of activity to avoid dismissal and thereby to obtain a hearing on her claims. . . .
>
> Further, the rule is not made unreasonable because it might lead to the dismissal of some cases that are not truly inactive. In this same vein, a statute of limitations that is rationally related to the goal of eliminating stale claims would not be unreasonable or unconstitutional because on occasion it might eliminate a claim that is not in fact stale. (6a)

The Supreme Court affirmed the judgment holding the Attorney General's 5-day notice statute to be constitutional. *Georgia Department of Medical Assistance v. Columbia Convalescent Center et al*, 265 Ga. 638, 458 S.E.2d 635 (June 30, 1995) rehearing denied July 28, 1995. See Appendix B at 2a-7a. (1995). Rehearing was denied on July 28, 1995. (1a).

RAISING OF CONSTITUTIONAL CHALLENGES

The constitutional challenges to the two statutes were made at the time these statutes were injected in the case by Respondent, when it filed its Motion to Set Aside on January 24, 1991 (R. 1772), following entry of judgment for Petitioners on the merits (R. 1761)(Appendix E at 17a-26a). The decision on the challenge to the two statutes was made by the trial court on September 8, 1994 upon remand from the Court of Appeals' decision (S.R. 130). The decision of the Supreme Court of Georgia upholding both statutes was rendered June 30, 1995, reh. den. July 28, 1995 (Appendix A and B, 1a; 2a-7a).

REASONS FOR GRANTING THE WRIT

I.

THE FAILURE TO PROSECUTE STATUTE (OCGA § 9-2-60) VIOLATES THE DUE PROCESS CLAUSE SINCE IT DOES NOT GIVE ADEQUATE NOTICE TO A PARTY AND CREATES A PRESUMPTION CONTRARY TO FACT:

A. The Reach of the Georgia Law.

Over thirty years ago this Court wrote:

> The State of Georgia is the only State -- indeed, apparently the only jurisdiction in the common-law world -- to retain the common-law rule that a person charged with a criminal offense is incompetent to testify under oath in his own behalf at his trial. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

ONCE AGAIN, GEORGIA HAS A STATUTE WHICH IS UNLIKE ANY OTHER STATUTE IN

ANY OTHER STATE IN THE UNITED STATES. [2] OCGA § 9-2-60 permits dismissal of a party's lawsuit without notice or hearing *either before dismissal or after dismissal* which might allow a party to correct any alleged default. Although Georgia law does permit renewal of a dismissed action by refiling within six months of dismissal,[3] the right to renew here is of little value in a situation like that now before the Court since Petitioners had in fact obtained an order of continuance within the five year period, but that order was later held to be invalid. Thus Petitioners had no notice that any six month period had begun to run.

Furthermore there may be other situations where the party has no knowledge that the case has been automatically dismissed without notice or even docket notation. See *Republic Claims Service Co. v. Hoyal*, 210 Ga. App. 88, 91, 435 S.E.2d 612 (1903) declaring that the right to renew under § 9-2-60 to be a "fictitious remedy." Notice after dismissal is not required despite the fact that as a general proposition, the Georgia courts held that dismissal of a case without notice of that fact, even where motions are pending and the party knows that dismissal is a possibility, is error.[4] Not so as to dismissals

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2 Petitioners presented an appendix to the Georgia courts below summarizing the statutes and some decisions interpreting them in all of the States which appeared to have a failure to prosecute statute. Most states, like Georgia, do have a provision similar to Rule 41 (b), FRCP, but that Rule requires notice prior to dismissal, and some states, like the federal system, permit hearing after dismissal.

3 OCGA § 9-2-61. This statute applies to cases dismissed under § 9-2-60. *City of Chamblee v. Village of North Atlanta*, 217 Ga. 517, 523, 123 S.E. 2d 663 (1962); *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E. 2d 255 (1962).

4 *Cambon v. Canal Ins. Co.*, 246 Ga. 147 (1), 269 S.E.2d 426 (1980); *Morgan v. Starks*, 214 Ga. App. 265, 447 S.E.2d 651 (1994)

under § 9-2-60. Failure to give notice after dismissal was held to violate due process in *Neylan v. Vorwald*, 121 Wis. 2d 481, 360 N.W. 2d 537 (Wis. App. 1984), aff'd 124 Wis. 2d 85, 368 N.W. 2d 648 (1985).

Moreover, dismissal is required under §9-2-60 even where in fact there is no failure to prosecute and the case is being prosecuted diligently at the time of dismissal. This is so because instead of either giving notice prior to dismissal as required under Rule 41(b), FRCP, and the Georgia counterpart OCGA §9-11-41(b), or permitting a hearing after the fact as in the case of Rule 41(b), see *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), Georgia does not permit evidence to be shown with respect to dismissals under §9-2-60, nor does it permit reconsideration after dismissal occurs. *Bainbridge & Associates v. Johnson*, 183 Ga. App. 784, 785, 360 S.E. 2d 273 (1987).

Nor is the law in any way similar to laws in other states, declaring that a case stands dismissed where there is no activity during a stated period (See n. 2 supra) so that any docket entry is sufficient to prevent dismissal, and with the party also being entitled to show activity by evidence outside the record. Instead, OCGA §9-2-60 results in automatic dismissal without notice by use of a surrogate for failure to prosecute which is by no means indicative of activity *vel non*, and which often results in dismissal where the case bristles with activity, as was the case here and in another reported case, *Republic Claims Service Co. v. Hoval, supra*. In *Republic Claims* the Court of Appeals concluded that OCGA §9-2-60 was arbitrary and not calculated to reflect inactivity.[5]

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5 "If defendant's 'orders' of continuance 'written' in the docket were good enough to stop plaintiff from getting a trial for five years, they are good enough to stop defendant from being rewarded with a dismissal. The term 'written' order in OCGA §9-2-60 is too uncertain to justify penalizing the plaintiff in this case.

The fact that no other state has any similar Draconian law and that every other jurisdiction determines whether a case is alive or not by examining the actual activity in the case, rather than by relying upon an artificial and distorted substitute, is an indication that its requirements do not comport with due process. See *e.g.*, *Honda Motor Co., Ltd. v. Oberg*, 114 S.Ct. 2331 (1994)(uniquenss of Oregon law which did not permit court review of size of damage awards imposed by jury is indication of violation of procedural due process); *Shaffer v. Heitner*, 433 U.S. 186 (1977)(uniqueness of Delaware law which permitted long arm jurisdiction over party based upon sequestering of property in state indication of procedural due process violation).

In view of the availability of OCGA § 9-11-4(b), which permits dismissal where failure to prosecute has been shown after hearing, OCGA §9-2-60 serves only the purpose of bringing about dismissal on grounds of failure to prosecute when such failure does not exist in fact -- through the use of the surrogate "order" -- and thereby stands exposed as just one more example of the inscrutable procedural trivia which has long

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This case does not deserve to be dismissed. It was gravid with life. It was not settled because defendant refused to send the settlement in the mail, and it never went to trial because defendant kept getting oral continuances until it could move for dismissal on grounds the case was 'dead'. (210 Ga. App. at 89).

"The 'evil' addressed by OCGA §9-2-60 -- the prolongation of inactive or unresolved cases -- does not exist here. This case was vibrant. The lack of a 'written order', whatever that means, does not prove a case in inactive, and the existence of a 'written order' does not prove a case is active.

characterized the Georgia Courts, as this Court is well aware.[6]

The end result is that the Georgia Supreme Court upheld the constitutionality of a State statute whose primary use (given the existence of § 9-11-41(b), permitting dismissal for lack of prosecution after hearing) is to permit dismissal of cases that are not inactive solely as a means of getting rid of cases which the Courts for some reason desire not to hear.

B. Petitioners Have Been Deprived of a Property Right without Due Process of Law.

Under both federal and state law, Petitioners had a property right in their claim for Medicaid reimbursement under federal law, 42 U.S.C. § 1376a(a)(13)(A), *Wilder v. Virginia Hospital Association*, 496 U.S. 498, (1990); *City of Athens v. McGahee*, 178 Ga. App. 76, 79, 341 S.E. 2d 855 (1986), and Petitioners also enjoyed a property right in their cause of action to enforce that federal right. *Nix v. Long Mountain Resources, Inc., et al*, 262 Ga. 506, 509, 422 (1992); *Polito v. Holland*, 258 Ga. 54, 365 S.E.2d 273 (1988); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Tulsa Collection Service v. Pope*, 485 U.S. 478, 485 (1988).

The state has deprived Petitioners of these property rights without procedural due process by not giving adequate notice or a hearing when these property rights are undermined.

In *Link v. Wabash R. Co.*, 370 U.S. 626 (1994), this Court recognized that dismissal of a case for failure

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6 See *Staub v. Baxley*, 355 U.S. 313, 320 (1958); *Reece v. Georgia*, 350 U.S. 85, 89-90 (1956); *Ford v. Georgia*, 498 U.S. 411, 424 (1991); *Reich v. Collins*, 513 U.S. _____ (1995).

to prosecute implicates procedural due process, but upheld dismissal there because petitioners' counsel had notice of the hearing, but failed to appear, and because the availability of a post-judgment hearing under Rule 60(b), FRCP, also satisfied the requirements of due process.[8] See also, in accord, *Logan v. Zimmerman Brush Co.* 455 U.S. 422 (1982), and *Societe Internationale v. Rogers*, 357 U.S. 197 (1359).

In this case, by contrast, there was no notice and no realistic opportunity to cure. In *Neyland v. Vorwald*, 121 Wis. 2d 481, 360 N.W. 2d 537 (Wis. App. 1984), aff'd 124 Wis. 2d 85, 368 N.W.2d 648 (1985), the Wisconsin Court held that dismissal of a personal injury action for failure to prosecute was void because of failure to give prior notice and hearing, relying on the proposition that dismissal of a case for failure to prosecute must comport with due process, and citing Link v. Wabash R. Co., supra. The Court also held that due process was denied in that the party was not given notice of dismissal after the fact.

The same situation applies here.

C. The Georgia Statute Is Not A Statute Of Limitations, And Is Not A Valid "Procedural Rule" As Held Below

The Georgia statute is not a statute of limitations, which depends solely upon the expiration of time, because the Georgia Courts have rejected that proposition. *Harris v. United States Fidelity & Guaranty Co.*, 134 Ga. App. 739, 740, 2d 127 (1975); *Swint v. Smith, supra*, (219 Ga. at 535); *Allstate Insurance Co. v. Dobbs*, 134 Ga. App. 275, 213 S.E.2d 915 (1975).

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8 Three justices dissented, and two justices took no part in the decision, so the opinion of the Court was by a plurality only.

Nor is the statutory requirement that certain orders be entered within a five-year period a simple "procedural rule" as stated by the Georgia Supreme Court, similar to a filing deadline or a rule requiring that issues be timely raised, non-compliance with which results in dismissal. Instead, in § 9-2-60, failure of the orders is used simply as a surrogate for a determination based on notice and hearing that the case is inactive. As many times held by the Georgia courts, OCGA § 9-2-60 has the dual purpose of "preventing court records from becoming cluttered by unresolved and inactive litigation and protecting litigants from dilatory counse." *Swint v. Smith, supra*, (219 Ga. at 534); *City of Chamblee v. Village of North Atlanta, supra, Lewis v. Price*, 104 Ga. App. 473, 476, 122 S.E.2d 129 (1961); *Freeman v. Ehlers*, 108 Ga. App. 640, 134 S.E. 2d 530 (1963); *Berry v. Siskin*, 128 Ga. App. 3, 6, 195 S.E.2d 255 (1973); *Jefferson v. Ross, supra*.

D. The Validity of the Statute Is Determined In Light of the Interpretation of the Law Made by the Georgia Courts.

The constitutionality of the OCGA § 9-2-60 must be considered in light of the interpretations placed on it by the Georgia appellate courts. *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 113 (1937); *Anglo-American Provision Company v. Davis Provision Company*, 191 U.S. 373, 374 (1903); *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973); *Kolender v. Lawson*, 461 U.S. 352, 355 (1983); *Winters v. New York*, 333 U.S. 507, 514 (1948). The decisions of the two Georgia appellate courts demonstrate that rampant uncertainty and arbitrary edict characterize the interpretation placed on OCGA § 9-2-60.

For example, in *Beck v. Dean*, 177 Ga. App. 144, 338 S.E.2d 693 (1985), the Court of Appeals declared that the entry of an order that did not advance the progress of the case would not suffice to bar the statute, but nine years later in *Department of Transportation v. Tillett Brothers Construction Co.*, 264 Ga. 219, 221, 443

S.E.2d 610 (1964), the Supreme Court disapproved this proposition. *Beck v. Dean, supra*, also held that an order to show cause does not suffice under §9-2-60, although such an order is a frequently used means of activating a hearing and bringing about a resolution of the case. In *Republic Claims v. Hoyal*, 210 Ga. App. 88, 90, 435 S.E.2d 612 (1993), reversed on other grounds, 264 Ga. 127, 441 S.E.2d 755 (1994), the Court of Appeals observed that "The meaning of 'written order' in OCGA §9-2-60 is so unclear that it has been debated often and with two varied results, as proved by the many cases annotated to the statute and by the cases cited by the dissent."

In *Georgia Power Co. v. Whitmire*, 146 Ga. App. 29, 245 S.E.2d 324 (178), and in *Dupriest v. Reese*, 104 Ga. App. 805, 123 S.E.2d 161 (1961), a written notation of continuance signed by the Judge on the court calendar and filed with the Clerk, was held insufficient, while in *Manors v. Lewis*, 135 Ga. App. 420, 218 S.E.2d 130 (1975), pretrial instructions mailed by the Court in the case with the judge's signature, were also held insufficient. *Parkerson v. Indies Co., Ltd.*, 148 Ga. App. 106, 251 S.E. 2d 98 (1978) held that an order assigning cases for trial was insufficient.

An order granting a leave of absence was held sufficient in *Loftin v. Prudential Property & Ins. Co.*, 193 Ga. App. 514, 388 S.E.2d 525 (1989), indicating that the order dismissing an attorney of record was sufficient in this case, except for the Court of Appeals' erroneous conclusion that the notice required by the Attorney General's statute had not been given (203 Ga. App. at 536), when in fact the record showed clearly that there had been 10 days notice addressed to DMA's counsel. (R. 1476-1477, 1836, 1825-28). In this case, the Court also held that the statute could never be waived by conduct, 203 Ga. App. 535, and see *Swint v. Swint, supra*, in accord, which places it on a plane higher than the constitutional right to life and liberty. The decision of the Court of Appeals also held that a Court could never reinstate a case regardless of the circumstances, 203 Ga.

App. at 536, which differs from laws found in a number of states that do permit reconsideration of a dismissal order for failure to prosecute.

In *Republic Claims Service Co. v. Hoyal, supra*, the Court of Appeals further observed that the statute is "a remedial statute in derogation of a party's constitutional rights, and is to be applied liberally so as not to damage those rights." (210 Ga. App. at 90). Nevertheless, that has not been the case, for although the statute was first enacted in 1953 (Ga. Laws 1953 Nov. Dec. Sess., p. 342), it had been on the books for 40 years before the Supreme Court made the statute even more harsh by holding for the first time in *Department of Transportation v. Tillett Brothers Construction Co., Inc.*, 264 Ga. 219, 221, 443 S.E.2d 610 (1994), that in order to suffice for tolling, an order must be "an order entered by a court in response to a motion initiated by a party."

Even estoppel does not apply to the dormancy statute. *Salter v. Chatham County*, 136 Ga. App. 914, 222 S.E.2d 638 (1975). An appellate court order does not suffice, although it clearly constitutes "activity". *Kachwalla v. Byrne*, 198 Ga. App. 454, 402 S.E.2d 74 (1991). On the other hand, judgment may be entered on a verdict at any time, and dormancy does not apply in such cases, *Jefferson v. Ross, supra*, and the same applies where a case stands in default more than five years, *Faircloth v. Cox Broadcastinq Corp.*, 169 Ga. App. 914, 315 S.E.2d 435 (1984), but a settlement reached after five years has expired is not enforceable. *Stephens v. Stovall & Co.*, 184 Ga. App. 78, 360 S.E.2d 638 (1987).

And, as discussed above, *nunc pro tunc* orders were held available to document a continuance verbally granted but not contemporaneously signed by the trial judge in *Jefferson v. Ross, supra*, but *Jefferson* was not followed by the Court of Appeals in this case. The statute creates an irrebuttable presumption of inactivity even though the docket shows that the case is being pursued by depositions, hearings, etc.; no notice is given before or after dismissal, which is automatic, and no

remedy exists for reconsideration as exists under federal Rule 60.

E. The Georgia Dormancy Statute Violates the Substantive Due Process Rights of Petitioners.

OCGA §9-2-60 creates a conclusive presumption of inactivity in cases which clearly are active, and therefore violates the substantive due process rights of Petitioners under the rule that a presumption is void if there is no rational connection between what is proven and what is presumed. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 643 (1974); *Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); U.S. *Department of Agriculture v. Moreno*, 413 U.S. 578 (1973); *U.S. Department of Agriculture v. Murry*, 413 U.S. 508 (1973).

The Georgia courts followed this same rule in two decisions involving a very similar issue, abandonment of a child, which is presumed by failure of the father to pay child support under court order for one year, *Thorne v. Padgett*, 259 Ga. 650, 386 S.E.2d 155 (1959), and presumption of abandonment of a vehicle by failure to claim from a garage, etc., within 60 days. *Gore v. Davis*, 243 Ga. 634, 256 S.E.2d 329 (1979).

Here, a conclusive presumption that a party has abandoned his case arises from the failure of certain orders to be entered within a five-year period when in fact many cases in which no orders are entered are quite active. The Georgia Supreme Court did not follow these cases here, or even distinguish them, however. The determination by the Georgia Supreme Court in this case that the failure to enter an order within five years is conclusive proof of inactivity creates a presumption contrary to fact and therefore violates this Court's holdings in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 643 (1974); *Vlandis v. Kline*, 412 U.S. 441, 446 (1973) and *Stanley v. Illinois*, 405 U.S. 645 (1972);

II.

THE ATTORNEY GENERAL'S FIVE-DAY NOTICE STATUTE, OCGA § 9-10-2, VIOLATES EOUAL PROTECTION

The Georgia Supreme Court upheld the Attorney General's statute, applying the rational basis test and concluding that because the Attorney General represents public agencies all over the state, it is not unreasonable that he be afforded more protection with respect to notice than other litigants.

Even if rational basis review applies here, by its very nature as a fundamental right, the due process right of notice and hearing does not admit of much classification, because the subject matter in question, notice and hearing, is of equal benefit and importance to all litigants.

However, even granted that the Attorney General represents agencies throughout the State, this provides no valid basis for classification, because many private corporations, including Georgia Power Company, many liability and worker's compensation insurance companies, state-wide banks and other entities also have state-wide litigation responsibilities and the Attorney General stands in no different position than many of these private corporations and entities. As shown by official records on file in the State Library, the Attorney General has 344 deputies and other assistants scattered all over Georgia, some of whom earn several hundred thousand dollars a year, which places the attorney General in a much better position than any private company in the state.

Additional circumstances that render the classification objectionable is the fact that it prevents the granting of any emergency relief whatever, against any state agency, and because of the unduly stringent way in which the statute has been interpreted, it renders void any ex parte order against the State regardless of

whether that order impinges to any extent upon any substantial property or other interest of the state. In this case, for example, the Court of Appeals held that a continuance order was void, although all it did was to state that the case was continued pending hearing on the order to show cause contained therein, setting a hearing for one month and 17 days thereafter, on October 17, 1989 (R. 1459). The state did not object to this order at any time, and since a continuance by its nature has no practical impact until the time that the case otherwise would have been heard, the State was not harmed by the entry of this order on September 1, 1989. If the state deemed itself harmed, application could have been made to the Court to vacate the order prior to the date originally set, and let the case proceed on the normal course. The normal course presumably would have been that the case would have remained pending, because the State had never sought to bring it on for hearing previously. Since it looks to the future, a continuance order does not impose any immediate burden, and the State here had 47 days' notice prior to the time this order could have any effect. The Court of Appeals has held that in an ordinary civil case, an order of continuance is not invalid. *Simmerson v. Blanks*, 183 Ga. App. 863, 864, 360 S.E. 2d 422 (1987). This is a recognition that an order of continuance does not impair any substantial rights, else ex parte entry would be illegal, as to any party, yet the Court of Appeals in this case held that such an order was void under §9-10-2.

This not only says that the Attorney General's rights of prior notice are greater than that of a private litigant, but that these rights can never be waived by conduct. Despite the action of the Attorney General in responding to the show cause/continuance ex parte order, and pleading to the merits for over a year without objecting, he was held not to have waived non-compliance. Georgia law recognizes the doctrine of waiver by statute, OCGA §1-3-7, and in *Wells v. Pridgen*, 154 Ga. 397 (3) 114 S.E. 355 (1922), the Supreme Court held: "The return of a verdict of guilty by the jury against the accused, without the introduction of any evidence,

and without any instructions by the court, does not render the sentence of the court void; but the return of such verdict under such circumstances, if without the consent of the accused, was error which should have been corrected by a motion for new trial or writ of error." See also, *Senters v. Wright & Lopez. Inc.*, 220 Ga. 611, 614, 140 S.E.2d 904 (1965) (one going to trial without objection waives constitutional validity of the Court trying defendant); *Parker v. Mercer*, 111 Ga. App. 108, 140 S.E.2d 915 (1965) (By pleading to the merits, a defendant waives the jurisdiction of the Court).

Here, the Attorney General also had substantial notice that the case would be continued because of a letter of counsel of August 9, 1989, stating that a motion would be filed shortly which would require a hearing -- some 23 days prior to the entry of the continuance order (R. 1819-20). Yet the Court of Appeals held this insufficient, and rejected petitioners' claim of waiver by virtue of the state's pleading to the merits for over a year and then objecting only after judgment (R. 1761). Apparently, §9-10-2 can be waived by the Attorney General only by a formal, written document.

Equal protection affords protection against irrational discrimination in the conferring of judicial procedural rights, *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Truax v. Corrigan*, 257 U.S. 312 (1921); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), including notice and hearing. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

Even if the Attorney General had the requisite notice, that would not be sufficient under the statute if the record did not affirmatively show that fact, and the opposite party is not permitted to show that notice was in fact given. The courts have frequently held that the record must affirmatively show that the Attorney General had the five (5) days' notice, else a judgment against the state is absolutely void. *Cofer v. Williams*, 141 Ga. App. 72, 232 S.E.2d 610 (1977); *Caldwell v. Atlanta Board of Education*, 152 Ga. App. 291, 292 (3), 262

S.E.2d 573 (1979); *Georgia Real Estate Commission v. Aina*, 154 Ga. App. 551, 269 S.E.2d 485 (1980).

Under the present law of Georgia, which includes § 9-60-2, a superior court is empowered to issue a TRO at the instance of the Attorney General, adjoining the operation of every bank, public school, post office, power company, telephone company, and fire department in the State of Georgia, without any prior notice, but an order merely postponing a hearing for six (6) days in which the Attorney General is involved, would be completely void under the statute, even though such an order has been recognized by the Court of Appeals itself in *Simmerson v. Blanks, supra*, as being one which does not affect any substantive rights.

III.

THE GEORGIA RULE CANNOT BE APPLIED TO UNDERMINE PETITIONER'S CLAIMS UNDER FEDERAL LAW

Federal rights can not be destroyed by unreasonable rules of state procedure. *Felder v. Casey*, 487 U.S. 131, 138 (1988); *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 296 (1949). To apply the irrational and imprecise failure-to-prosecute law under §9-2-60 and to provide the Attorney General with such special privileges as § 9-10-2, while all other litigants have no such rights, undermines a party's rights under federal law. On that basis alone, the decision below must be reversed.

CONCLUSION

The Georgia appellate courts effectuated a dismissal of Petitioners' civil action to vindicate the federal right to fair Medicaid reimbursement on grounds that the case was not being prosecuted when that was not true. This was done in two ways: (1) By denying Petitioners notice and opportunity for notice and hearing, [and one of the principal purposes of notice and hearing is to avoid errors such as occurred here, *Mathews v. Eldridge*, 424 U.S. 319, 345 (1976)]; and (2) By use of the two statutes which are under challenge here: one which raises a conclusive presumption of a factually-intensive issue -- failure to prosecute -- by making the issue of activity depend upon the entry of orders whose absence by no means connotes inactivity, and by reliance on the Attorney General's special statute which confers on him more rights than those enjoyed by any local government, citizen, federal agency, or anyone else in the state. The Attorney General's 5-day statute is being used as a sword, and the Supreme Court has used its discretion of review by certiorari, which was denied so as to deprive Petitioners of a judgment validly entered, and its discretionary review of the decision of the trial court in favor of DMA, in such a manner as to exacerbate the discrimination inflicted by OCGA § 9-10-2. Certiorari should be granted.

Dated: October 18, 1995

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APPENDIX

APPENDIX A

Supreme Court of Georgia.

Case No. S95A04897

July 28, 1995.

GEORGIA DEPARTMENT OF MEDICAL ASSISTANCE v. COLUMBIA CONVALESCENT CENTER et al

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

Upon consideration of the Motion for Reconsideration filed in this case. It is ordered that it is hereby denied.

All of the Justices concur, except Hines, J. not participating.

APPENDIX B

GEORGIA DEPARTMENT OF MEDICAL ASSISTANCE v. COLUMBIA CONVALESCENT CENTER et al

Supreme Court of Georgia.
June 30, 1995.

Reconsideration Denied July 28, 1995.

Appeals were taken from judgments entered in the Columbia County Superior Court, Albert Pickett, J., finding that statute pursuant to which action shall automatically stand dismissed if no written order is taken in action for five years violated due process but that statute pursuant to which certain judicial actions taken in cases in which state is party are void unless Attorney General is given five days written notice did not violate equal protection. The Supreme Court, Sears, J., held that: (1) automatic dismissal statute did not violate due process, and (2) state notice statute did not violate equal protection.

Affirmed in part, reversed in part.

Michael J. Bowers, Atty. Gen., William C. Joy, Kathryn Allen, Asst. Attys. Gen., State Law Department, Atlanta, for Georgia Dept. of Medical Assistance.

Albert H. Dallas, Dallas, Fowler & Wills, Thomson, E. Freeman Leverett, Heard Leverett Phelps Weaver & Campbell, Elberton, for Columbia Convalescent Center.

Robert M. Heard, Heard, Leverett, Phelps, Weaver etc., Elberton.

Gerald R. Weber, American Civil Liberties Union, Atlanta, Leon Friedman, New York, Samuel W. Oates, Jr., Columbus, Elizabeth F. Bunce, Franklin, Taulbee, Rushing & Bunce, Statesboro.

Keith A. McIntyre, Franklin, Taulbee & Rushing, Statesboro.

Douglas P. Haines, Athens, Eric E. Huber, Atlanta.

SEARS, Justice.

This appeal and cross-appeal involve the constitutionality of two statutes. One is OCGA § 9-2-60, which provides that if no written order is taken in an action for five years, the action "shall automatically stand dismissed" (the "automatic dismissal statute"). [1] The other is OCGA § 9-10-2, which provides that certain judicial actions taken in cases in which the state is a party are void unless, among other things, the Attorney General was given five days written notice of the hearing or trial that resulted in the judicial action (the "state notice statute"). [2] The trial court held that the automatic

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1 Section 9-2-60 provides in full as follows: (a) For the purposes of this Code section, an order of continuance will be deemed an order and the word "proceedings" shall be held to include, but shall not be limited to, an appeal from an award of assessors or a special master in a condemnation proceeding. (b) Any action or other proceeding filed in any of the courts of this state in which no written order is taken for a period of five years shall automatically stand dismissed with costs to be taxed against the party plaintiff. (c) When an action is dismissed under this Code section, if the plaintiff recommences the action within six months following the dismissal then the renewed action shall stand upon the same footing, as to limitation, with the original action.

2 OCGA § 9-10-2 provides in full as follows: Any verdict, decision, judgment, decree, order, ruling, or other judicial action by any court in this state in any matter in which this state or an official of this state in his official capacity is a party defendant, intervenor, respondent, appellee, or plaintiff in fi. fa. shall be void unless it affirmatively appears as a matter of record

dismissal statute violated due process because it does not require a hearing before dismissal to determine whether an action is actually dormant. The court held, however, that the state notice statute did not violate equal protection guarantees. We granted an application to appeal filed by the Georgia Department of Medical Assistance (the "DMA") to consider whether the trial court erred by ruling that the automatic dismissal statute was unconstitutional. The Columbia Convalescent Center ("Columbia") has cross-appealed the trial court's ruling that the state notice statute is constitutional. [3] Because we conclude that the automatic dismissal statute is a reasonable procedural rule that gives litigants a fair opportunity to litigate their claims before dismissal, we hold that it is constitutional and reverse the trial court's decision. Moreover, because we conclude that the state notice statute is rationally related to several legitimate state interests, we hold that it is constitutional and affirm the trial court's ruling.

1. The automatic dismissal statute does not violate due process. A litigant does have a property interest in her cause of action that she may not be

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either: (1) That the Attorney General was given five days' advance written notice by the adverse party or his attorney of the time set for the particular trial, hearing, or other proceeding as a result of which the verdict, decision, judgment, decree, order, ruling, or other judicial action was entered; or (2) That the Attorney General or an assistant attorney general was present in person at the trial, hearing, or other proceeding; or (3) That the Attorney General or an assistant attorney general has, in writing, waived the notice.

3 For the previous history of this case, see Dept. of Medical Assistance v. Columbia Convalescent Center, 203 Ga.App. 535, 417 S.E.2d 195 (1992).

deprived of without due process. [4] A state may, however, consistent with due process, terminate a litigant's claim or appeal for failure to comply with a reasonable procedural or evidentiary rule, [5] such as a statute of limitations.[6]

We conclude that the automatic dismissal statute is a reasonable procedural rule. It is reasonable, in part, because it "furthers the dual purpose of ... prevent[ing] 'court records from becoming cluttered by unresolved and inactive litigation and [of] protect[ing] litigants from dilatory counsel.'" [7] The statute also affords litigants, who have constructive knowledge of its provisions, "'an

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4 Nix v. Long Mtn. Resources, 262 Ga. 506, 509(3), 422 S.E.2d 195 (1992); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

5 Nix, 262 Ga. at 509, 422 S.E.2d 195; Logan, 455 U.S. at 437, 102 S.Ct. at 1158-59; Thomas v. Arn, 474 U.S. 140, 155, 106 S.Ct. 466, 474-75, 88 L.Ed.2d 435 (1985).

6 Logan, 455 U.S. at 437, 102 S.Ct. at 1158-59. The decision in Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, illustrates the principle set forth in the text. That case concerned a rule of the United States Court of Appeals for the Sixth Circuit that requires a habeas petitioner to file objections to a magistrate's report with the district court within 10 days of the magistrate's report or waive the right to appeal any ruling by the district court to the circuit court. Noting that litigants know of the rule and can obtain their appeal simply by filing a piece of paper stating objections, the Supreme Court held that the rule did not violate due process in that it was a reasonable procedural rule that afforded litigants a meaningful opportunity to litigate their claims.

7 Dept. of Transp. v. Tillett Brothers Const. Co., 264 Ga. 219, 220, 443 S.E.2d 610 (1994) (quoting Swint v. Smith, 219 Ga. 532, 534(3), 134 S.E.2d 595 (1964).

opportunity ... at a meaningful time and in a meaningful manner'" [8] to litigate their claims. To this end the statute grants a litigant five years to produce only the most minimal of activity to avoid dismissal [9] and thereby to obtain a hearing on her claims. Moreover, in the event of dismissal, it permits the litigant to obtain a hearing on her claims by giving her the right to renew the action within six months of dismissal. [10] Further, the rule is not made unreasonable because it might lead to the dismissal of some cases that are not truly inactive. In this same vein, a statute of limitations that is rationally related to the goal of eliminating stale claims [11] would not be unreasonable or unconstitutional because on occasion it might eliminate a claim that is not in fact stale.

2. Further, we hold that the state notice statute does not violate equal protection merely because it grants a benefit to state litigants that is not provided to other litigants.

Regarding the standard to apply in deciding equal protection claims, "'[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.'" Love v. Whirlpool Corp., 264 Ga. 701, 704, 449 S.E.2d 602 (1994) (quoting Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)). Moreover, "'[i]t is not necessary that the classification scheme be the perfect or the best one; nor do we focus on the fairness

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8 Thomas, 474 U.S. at 155, 106 S.Ct. at 474-75.

9 Dept. of Transp., 264 Ga. at 220-221, 443 S.E.2d 610.

10 OCGA § 9-2-60(c).

11 Craven v. Lowndes County Hosp. Auth., 263 Ga. 657, 659, 437 S.E.2d 308 (1993).

of a state law.'" Love, 264 Ga. at 704, 449 S.E.2d 602 (quoting Bowman v. Knight, 263 Ga. 222, 430 S.E.2d 582 (1993)).

In the present case, we agree with the Department of Medical Assistance's argument that the state notice statute is rationally related to several legitimate governmental interests. The Attorney General's office represents numerous state agencies and officials in courts all over the state, many of which are some distance from the Attorney General's office. The state notice statute is a rational provision that ensures that attorneys in the Attorney General's office will have time to travel to those locations and to familiarize themselves with the particular agency or official involved, as well as with any particular local rules and customs.[12] Further, the statute helps to ensure that state agencies and officials are properly represented in lawsuits that may affect the lives of citizens across the state. That the foregoing rationales for the statute might apply in some circumstances to private citizens involved in litigation does not render the statute unconstitutional, as the classification need not be perfect so long as it furthers a legitimate legislative goal. Love, 264 Ga. at 704, 449 S.E.2d 602.

Judgment reversed in Case No. S95A0497.
Judgment affirmed in Case No. S95X0499.

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12 See, for example, Uniform Superior Court Rules 1.1 and 1.2.

APPENDIX C

IN THE SUPERIOR COURT OF COLUMBIA COUNTY
STATE OF GEORGIA

COLUMBIA CONVALESCENT CENTER et al.

Petitioners

vs.

GEORGIA DEPARTMENT OF MEDICAL ASSISTANCE,

Respondent

Civil Action No.
C84-311

ORDER AND JUDGMENT
of the Superior Court
dated August 2, 1994

This case is on remand from the decision of the Court of Appeals reversing the decision of this Court overruling Respondent's Motion to Set Aside based on grounds of dormancy under OCGA §9-2-60, but remanding to this Court for consideration of the constitutionality of OCGA §9-2-60 and OCGA §9-10-2. Department of Medical Assistance v. Columbia Convalescent Center, Inc., 203 Ga. App. 535, 417 S.E.2d 195 (1992), cert. den. July 16, 1992, remittitur filed, August 14, 1992. The case came on for hearing before this Court on September 24, 1992. Counsel for Petitioners and Respondent were present, and the Court heard arguments and received briefs. After giving consideration thereto, the Court now renders its decision, order and judgment.

I.

OCGA § 9-2-60: THE DORMANCY STATUTE

OCGA § 9-2-60 declares:

"(a) For the purposes of this Code section, an order of continuance will be deemed an order and the word 'proceedings' shall be held to include, but shall not be limited to, an appeal from an award of assessors or a special master in a condemnation proceeding."

"(b) Any action or other proceeding filed in any of the courts of this state in which no written order is taken for a period of five years shall automatically stand dismissed with costs to be taxed against the party plaintiff."

Petitioners attack the constitutionality of this Code section on the ground that it violates procedural due process in mandating automatic dismissal of petitioners' administrative appeal pursuant to OCGA § 50-13-19, based on dormancy without first providing notice or a hearing to determine the issue of dormancy, and that in creating a presumption of dormancy from the absence of an order, the statute also violates substantive due process in that there is no rational relationship between the facts stated in the statute and the fact of dormancy to be inferred therefrom. The Court finds it necessary only to consider the procedural due process challenge.

"A party's cause of action is a property interest that cannot be denied without due process." Nix v. Lona Mountain Resources Inc. et. al., 262 Ga. 506, 509, 422 S.E.2d 195 (1992); Logan v. Zimmermann Brush Co., 455 U.S. 422, 429, 102 S.Ct. 1148 (1982). The fundamental idea of due process is notice and an opportunity to be heard. James Beam Distilling Company v. State, 263 Ga. 609, 612, 437 S.E.2d 782 (1993); Nix v. Lona Mountain Resources. Inc.. et. al.,

262 Ga. at 509; Mathews v. Eldridge, 424 U.S. 319, 333; 96 S.Ct. 893 (1976). However, every civil litigant does not have the right to a hearing on the merits in every case. A state "accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." Logan v. Zimmermann Brush Co., 455 U.S. 422, 437, 102 S.Ct. 1148, 1158 (1982). The Fourteenth Amendment only requires "an opportunity [to be heard] granted at a meaningful time and in a meaningful manner." id. at 1159; Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965).

The issue then is whether the dormancy statute is unreasonable for its failure to provide notice or a hearing before, or after, dismissal. An inquiry into whether opportunity for a hearing is necessary should consider the importance of the individual interest involved, the probable value, if any, of additional or substitute procedural safeguards to that interest, and the governmental interest in fiscal and administrative efficiency. Mathews v. Eldridge, 424 U.S. at 335. In considering the probable value, if any, of additional-or substitute procedural safeguards, "the nature of the factual inquiry is critical." Id.

Unlike a statute of limitations which is designed to erect an absolute bar to judicial action based on the lapse of time alone, the dormancy statute has as its purpose only the "elimination" of "inactive cases", Lewis v. Price, 104 Ga. App. 473, 476, 122 S.E.2d 129 (1961); Freeman v. Ehlers, 108 Ga. App. 640, 134 S.E.2d 530 (1963); Berry v. Siskin, 128 Ga. App. 3, 6, 195 S.E.2d 255 (1973); Jefferson v. Ross, 250 Ga. 817, 819, 301 S.E.2d 268 (1983); Swint v. Smith, 219 Ga. 532, 534 (3), 134 S.E.2d 595 (1964), and is not a statute of limitations. Harris v. United States Fidelity & Guaranty Co., 134 Ga. App. 739, 216 S.E.2d 127 (1975). So long as orders are timely entered, the case may pend indefinitely.

The statute results in the automatic dismissal of cases in which no written order has been taken in five years but which might otherwise remain active. At the

same time, it allows a truly dormant case to be refiled. It is this reality that caused the Court of Appeals to declare "fairly ludicrous" the idea that the dormancy statute achieves the objective of resolving inactive litigation. Republic Claims v. Hoyal, 210 Ga. App. at 91.

It is true that the state has an interest in fiscal and administrative efficiency which would be aided by the dismissal of inactive litigation. The individual's interest in his or her cause of action is important, however, and, since some active cases would be dismissed under the statute, the probable value of additional or substitute procedural safeguards is high.

It is noteworthy that, of the thirty-seven states with automatic dismissal laws, Georgia alone denies notice, opportunity for a hearing or opportunity for reinstatement. Louisiana's automatic dismissal statute most closely resembles Georgia's in that it, like Georgia's alone, does not provide notice. La. Code of Civil Procedure Annotated, Art. 561 (West Supp.) However, unlike the statute here in question, application of the Louisiana statute can be waived by the conduct of the parties, State v. United Dredging Co., 218 La. 744, 50 So.2d 826 (1951). The Louisiana statute also allows the plaintiff to move for an order to show cause providing post-dismissal review, a right not accorded by our statute. Thus of the fifty states, Georgia alone has a dormancy statute which in all cases denies notice or opportunity for a hearing; a further indication that the value of such procedural safeguards outweighs the state's interest in tho efficient disposal of dormant cases.

The individual's interest in the preservation of his or her active cause of action, coupled with the probable value of such additional procedural safeguards as notice or opportunity for hearing, combine to outweigh the state's interest in any fiscal or administrative efficiency which might be furthered by application of the statute. Mathews v. Eldridge, 424 U.S. at 335.

IT IS THEREFORE ORDERED AND ADJUDGED, that OCGA § 9-2-60 is hereby declared to be unconstitutional, null and void, as being in violation of due process of law guaranteed by the Constitution of Georgia, Art. I, Sec. I, Par. I, and the Fourteenth Amendment to the Constitution of the United States.

FURTHER ORDERED, that Petitioners' challenge to the Attorney General's notice statute, OCGA § 9-10-2, is overruled, as that section does not appear to violate equal protection for any reason assigned.

The judgment of the Hearing Officer and of the Department of Medical Assistance approving same are hereby reversed, and the matter is remanded back to the Department of Medical Assistance with instructions that the pre-existing rate of 100% reimbursement for property and related be reinstated and made applicable to petitioners, with interest, on the same basis as applicable to other providers, for all the reasons previously stated in this Court's order and judgment entered December 26, 1990, which is hereby re-entered and by reference is incorporated herein and made a part hereof.

It is further ordered that petitioners recover their costs of court.

This 2nd day of August, 1994.

/s/ Albert M. Pickett
Judge Albert M. Pickett
Judge, Columbia Superior Court
Augusta Judicial Circuit

APPENDIX D

Court of Appeals of Georgia.

DEPARTMENT OF MEDICAL ASSISTANCE v.
COLUMBIA CONVALESCENT CENTER, INC. et al.

COLUMBIA CONVALESCENT CENTER, INC. et al.
v.
DEPARTMENT OF MEDICAL ASSISTANCE

203 Ga. App. 535, 417 S.E.2d 195

March 11, 1992.

Nos. A91A2169, A91A2170.

Michael J. Bowers, Atty. Gen., William C. Joy, Kathryn L. Allen, Sr. Asst. Attys. Gen., for appellant.

Heard, Leverett & Phelps, E. Freeman Leverett, Elberton, Dallas, Fowler & Wills, Albert H. Dallas, Thomson, for appellees.

McMURRAY, Presiding Judge.

Defendant Georgia Department of Medical Assistance is the state agency designated pursuant to federal law to supervise administration of Medicaid nursing home reimbursement. The seven plaintiffs are nursing homes which contested a change implemented in the limits for reimbursement in the property and related cost centers for those nursing homes having property transactions after May 6, 1981. A hearing officer concluded that the change in reimbursement rate had been accomplished in compliance with applicable state and federal statutes and regulations. A review by the Commissioner of the Department of Medical Assistance upheld the hearing officer's decision and the

nursing homes filed their petition for judicial review on October 12, 1984.

The superior court overturned the hearing officer's decision and ordered reinstatement of the previous rate of reimbursement. Defendant moved to set aside the superior court's order on the ground that the superior court lacked subject matter jurisdiction to enter such an order since the plaintiffs' case was automatically dismissed by operation of law because no written order was properly entered for a period of over five years. After the superior court denied defendant's motion to set aside, this court granted defendant's application for permission to appeal. Defendant Georgia Department of Medical Assistance appeals in Case No. A91A2169 while plaintiffs cross-appeal in Case No. A91A2170.

Held:

1. OCGA § 9-2-60(b) provides that: "Any action or other proceeding filed in any of the courts of this state in which no written order is taken for a period of five years shall automatically stand dismissed...." The operation of this provision cannot be waived by the parties. Harris v. Moody, 144 Ga.App. 656, 242 S.E.2d 321.

OCGA § 9-10-2 provides that: "Any verdict, decision, judgment, decree, order, ruling, or other judicial action by any court in this state in any matter in which this state or an official of this state in his official capacity is a party defendant, intervenor, respondent, appellee, or plaintiff in fi. fa. shall be void unless it affirmatively appears as a matter of record either: (1) That the Attorney General was given five days' advance written notice by the adverse party or his attorney of the time set for the particular trial, hearing, or other proceeding as a result of which the verdict, decision, judgment, decree, order, ruling, or other judicial action was entered; or (2) That the Attorney General or an assistant attorney general was present in person at the

trial, hearing, or other proceeding; or (3) That the Attorney General or an assistant attorney general has, in writing, waived the notice." See generally Caldwell v. Atlanta Bd. of Educ., 152 Ga.App. 291, 292(3), 293, 262 S.E.2d 573; Cofer v. Williams, 141 Ga.App. 72, 232 S.E.2d 610.

In the five-year interval following the filing of the plaintiffs' petition for judicial review on October 12, 1984, two orders of the superior court were entered. However, in neither instance was there compliance with the notice provisions of OCGA § 9-10-2. Therefore, the two orders are void and ineffective to prevent an automatic dismissal pursuant to OCGA § 9-2-60(b). Thus, the case sub judice was dismissed by operation of law on October 12, 1989, and any further action in the case other than dismissal is a mere nullity. Stephens v. Stovall & Co., 184 Ga.App. 78, 79(1), 360 S.E.2d 638; Bainbridge & Assoc., Architects, P.A. v. Johnson, 183 Ga.App. 784, 360 S.E.2d 273. It follows that the February 14, 1991, order of the superior court, nunc pro tunc to September 28, 1989, which records an oral continuance agreement of that date between counsel and confirmed by the superior court, was not effective to revive the already extinguished case. An automatic dismissal under OCGA § 9-2-60(b) results as a matter of law, and the court has no discretion to order it reinstated. Kachwalla v. Byrne, 198 Ga.App. 454, 402 S.E.2d 74; Earp v. Kranats, 184 Ga.App. 316, 317, 361 S.E.2d 217. See also Paris v. C & S Nat. Bank, 140 Ga.App. 417, 231 S.E.2d 357 and Freeman v. Ehlers, 108 Ga.App. 640, 134 S.E.2d 530. The superior court erred in entering the February 14, 1991, order and in denying defendant's motion to set aside.

2. In the cross-appeal, plaintiffs challenge the constitutionality of OCGA §§ 9-2-60 and 9-10-2. These issues lie within the exclusive jurisdiction of the Supreme Court of Georgia. Article 6, Section 6, Paragraph II(1) of the Constitution of the State of Georgia of 1983. Therefore, upon receipt of these appeals they were transferred to the Supreme Court, but were returned

because the constitutional issues raised in the cross-appeal had not been ruled on by the trial court. In this regard, we note that the constitutional issues were raised in the superior court by plaintiffs in opposition to defendant's motion to set aside but were not reached under the view of the case taken by the superior court and which we reverse in Division 1 of this opinion. Therefore, we remand Case No. A91A2170 to the superior court in order that the court may consider plaintiffs' constitutional issues in the light of our holding in Division 1.

Judgment reversed in Case No. A91A2169. Case No. A91A2170 remanded with direction.

SOGNIER, C.J., and COOPER, J., concur.

APPENDIX E

IN THE SUPERIOR COURT OF COLUMBIA COUNTY

STATE OF GEORGIA

Columbia Convalescent Center, Inc.
Comer Health Care, Inc.
Savannah Health Care, Inc.
Bon Air Life Care, Inc.
Brownwood Nursing Home, Inc.
Lafayette Health Care, Inc.
Bainbridge Health Care, Inc.

Petitioners,

v.

Georgia Department of Medical Assistance,

Respondent

CIVIL ACTION NO.C84-311

December 26, 1990

ORDER

Before the Court is a petition for judicial review pursuant to O.C.C.A. §50-13-19 in which Petitioners assert that the Department of Medical Assistance (DMA) and a hearing officer wrongfully determined that DMA properly altered reimbursement rates for the

"property and related" reimbursement component of the Medicaid Reimbursement Program, rates which were relied upon by Petitioners, all of whom are participants in the reimbursement program. After consideration of the evidence and the briefs submitted by DMA and Petitioners, the Court makes the following findings of fact and conclusions of Law.

Findings of Fact

The Medicaid program, 42 U.S.C. §1396 et. seq., provides reimbursement by the federal government of a portion of the payments made by participating states to hospitals and other organizations providing medical care to the indigent. Participation by states is not mandatory, but once a state elects to participate, it must comply with the federal guidelines. Every state that participates administers the program pursuant to a plan approved by the United States Department of Health and Human Services (HHS). See, Wisconsin Hospital Association v. Reivitz, 733 F.2d 1226 (7th Cir. 1984). Georgia elected to participate in the Medicaid program and the state plan apporved by HHS is effectuated by the Department of Medical Assistance (DMA). DMA's powers and duties are outlined in O.C.G.A. §49-4-142 et. seq.

The federal guidelines required Georgia's state plan for medical reimbursement to provide "for payment... of the hospital, skilled nursing facility, and intermediate care facility services provided under the plan hrought the use of rates . . . which the State finds, and makes assurances satifactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services inc conformity with applicable State and Federal laws, regulations . . . ." 42 U.S.C. §1396a(a)(13)(A)(part of the Boaren Amendment of 1980).

In order to meet the federal requirements, DMA has developed a formula approach whereby it computes a per diem reimbursement for each patient in each

participating home. Constituents of per diem reimbursement are "cost centers," which group the type of expenses incurred by the nursing homes. One of the type of expenses incurred by the nursing homes. One of the cost centers is "property and related." Before May 7, 1981, it was possible for a participating nursing home to receive 100% recovery of its costs in this "property and related" area. On May 7, 1981 DMA adopted an amendment which mandated that any facility having a property transaction after May 6, 1981 would be limited in reimbursement to the 90th percentile, the standard per diem, for the property and related cost center. "Property transaction" was to include leases, sales, or new construction occurring after May 6, 1981. See, Board of Medical Assistance, Minutes for May 7, 1981, p.2, and Memorandum to Board of Medical Assistance, May 7, 1981. The result of the amendment was to disallow future reimbursement of "property and related" costs of 100% and to limit reimbursement to the 90th percentile.

Under the 1981 rules of 42 CFR §447 et seq., DMA had to submit the assurances of §447.252(c) and the information in §447.255(b) to HHS whenever CMA wished to make a "significant change" in its methods and standards for determining the reimbursement rate. See, 42 CFR §447.255(a). There are no guidelines in the regulations as to what constitutes a "significant change" in the mechanisms for ascertaining reimbursement rates.

In a letter to HHS from DMA, Hubert Jordan, Director of the Division of Administration of DMA, states that the amendment did not require 60 day notice because it did not meet the 1% rule of 42 CFR §447.205. He concluded "[t]his is a minor change to the reimbursement system . . . and rates will continue to be reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." See, Petitioner's Exhibit 6. This statement is the only assurance to HHS the Court can find in the record. HHS subsequently approved the rate on August 4, 1981.

Petitioners in the case at hand received Certificates of Need (CON's) from the State Health Planning and Development Agency (SHPDA) when the reimbursement rate for "property and related" costs was at the higher than standard per diem rate,i.e. at the 100% reimbursement level. A CON is "an official determination by the planning agency [SHPDA] evidenced by certification pursuant to an application, that the action proposed in the application satisfied and complies with the criteria . . ." contained in O.C.G.A. §31-6-1 et. seq. In order to receive a CON, an applicant must submit information concerning new construction and establishment of new nursing homes to SHPDA, and SHPDA determines the need for new homes, the adequacy of a home's plan, and then may grant a CON pursuant to §1122 approval is needed to receive a CON, but such approval "does not amount to any direct financial commitment to the construction of a facility, nor does it guarantee payment after completion." NAACP v. Medical Center, Inc., 584 F.2d 619, 633 (3rd Cir. 1978); see generally, Wilmac Corporation v. Heckler, 633 F. Supp. 1000 (E.D. Pa. 1986).

Petitioners had to start construction within a year of receiving their CON's or the CON's would be forfeited. The providers thus began construction and incurred financial obligations relying on SHPDA's approval. In order to obtain financing and to form the prospectuses to present to lending institutions, the providers had no alternative but to employ DDMA's reimbursement rates existing at the time.

Upon completion or near completion of their projects, Petitioners signed provider agreements, Statements of Participation, with DMA, thus allowing them to participate in the Medicaid reimbursement program. A provider agreement is in effect the contract permitting a nursing home to receive reimbursement. Petitioner Columbia Convalescent's provider agreement became effective June 2, 1981 and Petitioners Comer's agreement was effectuated on June 8, 1981. All of the

other Petitioners signed their agreement after May 7, 1981.

Each of the providers received from DMA at some point a provider manual, also termed "Policies and Procedures for Nursing Home Services." The information in the manual was to aid the providers in complying with the rules and procedures governing the Medicaid program as it was administered by DMA. The manual was the principal source of information by which Petitioners were guided.

§1002.5 of the manual is purported to be a definition of "property transaction," see §1002.4(b), and reads as follows: "for property transactions after July 13, 1978 involving: the sale; lease; the first renegotiating, renewal, or other substantive change in any lease executed prior to July 14, 1978; new construction, replacement construction, expansion, or addition in excess of $100,000; or any other transaction requiring and receiving approval under Section 122 of the Social Security Act . . . ." There is no other explanation of "property transaction" in the manual or in any other written material issued by DMA.

DMA asserts that since all of the provider agreements were signed after the effective date of the change in the reimbursement rate, petitioners could only receive the standard per diem reimbursement for the cost center. Petitioners maintain in part that the change in the reimbursement rate did not provide them with adequate funds to cover their costs, and therefore they could not efficiently operate. They claim they should have received the rate prior to May 7, 1981 because they were nearly finished with construction and they had substantially relied on the rates existing during construction.

Petitioners obtained the requisites reviews of the amendment by DMA, and the amendment was upheld. The opinion of the Hearing Officer, Brad Cohen, which affirmed the change in the amendment, was issued on

October 7, 1983. Having exhausted their administrative remedies, Petitioners filed the present petition for judicial review with this Court in October, 1984 pursuant to O.C.G.A. §49-4-153-(c) and §50-13-19.

Conclusions

The Court is bound by the provisions of O.C.G.A. §50-13-19 of the Administrative Procedure Act in reviewing the matter at hand. §50-13-19(h) provides that

> [t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may revers or modify the decision if substantial rights of the appellant have been prejudiced because the administrative decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Georgia courts in reviewing decisions of administrative agencies follow generally recognized principles of law, an example of which can be found in AMISUB (PSL) v. State of Colorado Department of Social Services, 879 F.2d 789 (10th Cir. 1989).

> In reviewing nonadjudicatory agency actions, the court must determine whether the agency action was based upon a 'consideration of the relevant factors and whether there has been a clear error of judgment'. . . . 'The standard of review is highly deferential, presuming the agency action to be valid . . . if a reasonable basis exists for its decision.' However, the court is still

> obliged to 'engage in a substantial inquiry'. . . . In other words, the presumption 'is not to shield [the agency's] action from a thorough, probing and in-depth review.

AMISUB (PSL), 879 F.2d at 800; See generally, Liberty Mutual Insurance Co. v. Haygood, 81 Ga. App. 726 (1950) and Encyclopedia of Georgia Law, §29, Administrative Law (administrative determinations of questions of law are always open to review of the courts.)

After a thorough and in depth review, the Court accepts the hearing officer's findings of fact. The Court further holds that the agency's decision does not meet any of the criteria of §50-13-19(h) (1)-(5). However, the Court is concerned with whether certain aspects of the Agency's decision were arbitrary and capricious, or characterized by abuse of or clearly unwarranted exercise of discretion.

DMA's actions and the hearing officers conclusions in regards to the procedural requirements pertaining to adequate assurances to HHS were arbitrary and capricious for they were "based alone upon [the agency's will], and not upon any course of reasoning" or upon fair and careful consideration of the circumstances. See, F. Cooper, 2 State Administrative Law, 762-769 (1965); Board of Education of Blount County v. Phillips, 89 So. 2d 2d 96 (Ala. 1956); Boyle v. Rock Island Coal Mining Co., 256 Pac. 883 (Okla. 1925). The Court finds the change in the reimbursement rate for the "property and related" cost center amounted to a significant change. The very purpose of the change in the rate was that it was to combine with existing economic forces to have the effect of retarding the growth of nursing homes and new leases. See, Memorandum from Hubert Jordan to DMA of May 1, 1981. An alteration in reimbursement rates is significant when it has the effect of retarding growth and barring potential providers, who have binding financial obligations, are in various stages of construction, and

whose property transactions have been approved by the State, from efficiently and adequately operating under the new reimbursement program. Thus, DMA was required to submit to HHS the assurances and information outlined in 42 CFR §§447.252(c) and 447.255(b).

The Court finds that the assurance given by DMA was meager at best. DMA's assurance was simply a regurgitation of the language of 42 U.S.C.§1396a(a)(13)(A) and was in no way meaningful or helpful. The Boren Amendment, thought granting freedom to states to establish plans and rates that are reasonable and adequate, also requires states to provide adequate assurances to the Secretary (HHS) in order for the Secretary to make an intelligent review and decision regarding the states' findings. DMA's assurance in this instance gave the Secretary nothing on which to rely in affirming DMA's decision to amend the rate.

Concerning the matter of assurances, the United States Supreme Court in Wilder v. Virginia Hospital Association, 58 USLW 4795 (June 14, 1990), stated

> any argument that the requirements of findings and assurances are procedural requirements only and do not require the State to adopt rates that are actually reasonable and adequate is nothing more than an argument that the State's findings and assurances need not be correct. We reject that argument because if would render the statutory requirements of findings and assurances and thus the entire reimbursement provision, essentially meaningless . . . there would be no reason to require a State to submit assurances to the Secretary if the statute did not require the State's findings to be reviewable in some manner by the Secretary. We decline to adopt an interpretation of the Boren Amendment that would render it a dead letter.

58 USLW at 4799.

DMA erred by not supplying the proper assurances to the Secretary, and therefore the providers are "entitled to have the court invalidate the current State plan . . . ." Wilder, 58 USLW at 4801. If the Court allowed the assurances here to stand and be interpreted as satisfactory, the decision would nullify the duty to provide assurances of DMA's findings and, as the Wilder Court phrased it, would render the Boren Amendment a dead letter. DMA's actions indicate a lack of fair consideration of the circumstances and were based solely upon the will of the Agency so as to make its conclusions at best an abuse of or unwarranted exercise of discretion and at worst, arbitrary and capricious.

The hearing officer concluded that DMA's action of May 7 did not violate the federal requirements of §1396 and 42 CFR §447, but based this conclusion on HHS's approval of the amendment. Although HHS approval is evidence in support of finding a rate to be reasonable and adequate and DMA's actions proper, it is not conclusory proof that a rate is appropriate. Because HHS only reviews DMA's assurances, it does not have knowledge of the many facets of an amendment to which the hearing officer has access. HHS approval of a rate based on assurances is essentially a statement by HHS that is depends on the state system to have adequate means to formulate, effectuate, question, and contest rates so that the end product is a rate in compliance with federal guidelines, and that the State system employed these means in producing the rate presently subject to HHS approval. The hearing officer is part of the process in determining the property of DMA's actions. If the hearing officer is correct in concluding that he can not invalidate a rate approved by HHS, the hearing office's approval merely becomes a rubber stamp of HHS's approval, which in this instance, was a rubber stamp of the agency's spacious assurances. The Court will not give unfettered discretion for DMA in establishing reimbursement rates. The hearing officer's conclusions in this regard were cursory, not based upon valid reasons or consideration

~~of the~~ situation, and were therefore arbitrary and capricious.

Furthermore, DMA's failure to establish a precise and clear written definition of "property transaction" combined with its employment of the existing ambiguous explanation of the term to achieve a result that unjustly harmed Petitioners shocks the Court's sense of justice and concept of fairness. See, F. Cooper, p. 762-64; Mitthauer v. Patterson, 167 N.E.2d 731 (C.A.N.Y. 1960). Thus, the Agency's actions as to this matter were arbitrary and characterized by an abuse of discretion.

§1002.5 is a poor attempt by DMA to explain what is meant by "property transaction." The hearing officer concluded that the term as it applied to new construction of nursing homes was "somewhat unclear." See, p.6 of Decision of Hearing Officer. Hubert Jordan admitted that "property transaction" could be interpreted in more than one way. (Transcript, p.117). While DMA is not required to establish a particular rule or regulation, it must implement regulations which allow DMA, the hearing officer, the providers, and the reviewing courts to interpret and comprehend the duties imposed upon providers and DMA and how DMA effectuates the Medicaid program. DMA's regulation as to "property transaction" fails to forge any useful guidelines and fails to "give a person of ordinary intelligence fair notice of what is required." Magic Valley Potato Shippers, Inc. v. Secretary of Agriculture, 702 F.2d 840, 841 (9th Cir. 1983).

Upon generally recognized principles of law, an agency such as DMA must act fairly, with proper motives, and upon valid reasons. See, Executive Television Corp. v. Zoning Board of Appeals, 85 A.2d 904 (Conn. 1952). DMA's decision to use the nebulous concept of "property transaction" as the controlling factor upon which the reimbursement rate amendment was based does not meet that standard and is at lease an abuse of discretion. DMA realized the importance it

was placing on this term, and that Petitioners had no advance notice of how this concept would effect their participation in the Medicaid program. The Agency was fully aware of the detrimental effects its decisions and amendment would have upon Petitioners, but callously went forward with implementing the new rate. DMA's imposition of these procedural requirements, even if they were within the letter of the statutes, were arbitrary, capricious and an abuse of discretion for their imposition resulted in manifest unfairness in the circumstances. See, Lewis v. Department of Human Resources, 375 S.E.2d 713, 714 (N.C. App. 1989). The Court will not allow a decision which so shocks the Court's basic notion of fairness to stand.

The Court concludes that DMA's decisions surrounding the amendment to the reimbursement rate for the "property and related" cost component were arbitrary, capricious, and characterized by an abuse of discretion. Petitioner's substantive rights have been violated. The Court reverses the judgment of the hearing officer and orders that the pre-existing rate of 100% reimbursement be reinstated and made applicable to Petitioners.

So ordered this 26th day of December, 1990.

s/ Albert M. Pickett
Judge Albert M. Pickett
J.A.S.C.A.J.C

APPENDIX F

IN THE SUPERIOR COURT OF COLUMBIA COUNTY

STATE OF GEORGIA

COLUMBIA CONVALESCENT CENTER, INC., COMER HEALTH CARE, INC. SAVANNAH HEALTH CARE, INC. BON AIR LIFE CARE, INC., BROWNWOOD NURSING HOME, INC., LAFAYETTE HEALTH CARE, INC. and BAINBRIDGE HEALTH CARE, INC.

Petitioners,

VS:

GEORGIA DEPARTMENT OF MEDICAL ASSISTANCE,

Respondent.

CIVIL ACTION
FILE NO. C84-311

ORDER OF CONTINUANCE NUNC PRO TUNC

February 12, 1991

The hearing originally set in this case to be heard on October 17, 1989, at the Courthouse in Appling, Georgia (as set forth in Order entered August 28, 1989) is hereby continued and reset for hearing before the Court at the Courthouse in Augusta, Georgia, on November 9, 1989 at 10:00 A.M., before Honorable William M. Fleming, Judge, Augusta Judicial Circuit.

Entered this 12th day of February, 1991, nunc pro tunc as of September 28, 1989, this order being entered to perfect the record in this case, as more particularly set forth in order entered of even date herewith.

/s/Albert M. Pickett
Judge, Augusta Judicial Circuit

APPENDIX G

IN THE SUPERIOR COURT OF COLUMBIA COUNTY

STATE OF GEORGIA

COLUMBIA CONVALESCENT CENTER, INC., COMER HEALTH CARE, INC. SAVANNAH HEALTH CARE, INC. BON AIR LIFE CARE, INC,, BROWNWOOD NURSING HOME, INC., LAFAYETTE HEALTH CARE, INC. and BAINBRIDGE HEALTH CARE, INC.

Petitioners,

VS:

GEORGIA DEPARTMENT OF MEDICAL ASSISTANCE,

Respondent.

CIVIL ACTION
FILE NO. C84-311

ORDER ON PETITIONERS' MOTION FOR ORDER OF CONTINUANCE AND RESPONDENT'S MOTION TO SET ASIDE THE ORDER AND JUDGMENT ENTERED DECEMBER 26, 1990

February 12, 1991

The Motion of Petitioners for entry of an Order of Continuance Nunc Pro Tunc, and the Motion of Respondent to Set Aside the Order and Judgment of this Court entered December 26, 1990, came on for hearing before the Court at Augusta on February 12, 1990, at 11 o'clock A.M., pursuant to order to show cause and notice dated January 28, 1991. Both parties

were represented by counsel, with Senior Assistance Attorney General Kathryn Allen appearing on behalf of Respondent Georgia Department of Medical Assistance.

The Court received in evidence on the Motion, the affidavit and amended affidavit of E. Freeman Leverett, with exhibits, the affidavit of Mr. Melvin M. Goldstein, the stipulation of Ms. Kathryn Allen, Senior Assistant Attorney General; and all exhibits attached to the pleadings.

After hearing evidence and argument of counsel, the Court finds that on August 28, 1989, Honorable William M. Fleming of this Court issued an order to show cause setting this case for hearing in Appling, Georgia, on October 17, 1989 and continuing the case from the regular calendar; that this order to show cause and order of continuance was duly served on Ms. Allen by mail; that on September 28, 1989, counsel for the parties, including Ms. Allen, agreed upon a continuance of said hearing originally set for October 17, 1989, to November 9, 1989 in Augusta; that counsel for Petitioners called Judge Fleming of this Court on said date, and obtained leave of Court for such continuance, and confirmed this in writing to Ms. Allen by letter dated September 28, 1989, which was received by her the next day; that there was therefore in fact a continuance agreed upon between the parties, and confirmed by the Court, although no written order of continuance was entered, and that an order of continuance nunc pro tunc should be entered at this time to record action actually taken but not put into writing.

IT IS THEREFORE ORDERED, that an order nunc pro tunc will be entered this date.

The Court further heard Respondent's Motion to Set Aside the Court's Judgment of December 26, 1990, and received the stipulation and affidavits offered by the parties, and all exhibits attached to the Motion and all

exhibits attached to the response of Petitioners and the affidavits thereto.

After giving consideration to the pleadings, evidence and argument of counsel,

IT IS ORDERED AND ADJUDGED, that Respondent's Motion to Set Aside is
Hereby Denied.

This February 12, 1991

/s/Albert M. Pickett
Judge, Augusta Judicial Circuit